12-707-cv(L)

12-791-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENTERGY NUCLEAR VERMONT YANKEE, LLC,
ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs-Appellees-Cross-Appellants,

—against—

PETER SHUMLIN, in his official capacity as Governor of the State of Vermont, WILLIAM SORRELL, in his official capacity as the Attorney General of the State of Vermont, JAMES VOLZ, in his official capacity as a member of the Vermont Public Service Board, JOHN BURKE, in his official capacity as a member of the Vermont Public Service Board, DAVID COEN, in his official capacity as a member of the Vermont Public Service Board,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million American businesses and professional organizations of every size and in every sector and geographic region of the United States. More than 96% of the Chamber's members are small businesses with 100 employees or less. In addition to businesses, the Chamber's membership also includes trade and professional associations.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases of vital concern to the Nation's business community, including in many preemption cases in the Supreme Court and this Court. *See, e.g.*, *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174 (2d Cir. 2012); *Bruesewitz v. Wyeth LLC*,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. All parties to this proceeding have consented to the filing of this brief through a general consent letter. *See* No. 12-707, D.E. #53.

131 S. Ct. 1068 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008).

The Chamber and its members have a significant interest in this case, which principally concerns whether courts should look beyond general statements of legislative purpose in preambles when determining whether the law impermissibly treads on an area of exclusive federal regulation. The Supremacy Clause's proper operation cannot be derailed by words unhinged from legislative reality. When Congress has determined that uniform federal regulation is needed in specified areas, the Chamber's members need to be able to operate and manage their business affairs within the reasonably consistent and stable regulatory environment that Congress promised. The Chamber thus submits this brief to explain more fully the important implications of this case and preserving proper rules of preemption analysis for the full range of American businesses.[2]

SUMMARY OF ARGUMENT

The Constitution, treaties, and federal statutes are "the supreme law of the land," U.S. CONST. Art. VI, cl. 2, and thus a congressional choice to occupy a field displaces contrary state law. The Supremacy Clause's limitation on state laws is a

[2] The Chamber takes no position on the Dormant Commerce Clause or Federal Power Act issues in this case, *see* Vermont Br. 47-57; Entergy Br. 60-68.

vital component of the "delicate balance" struck by the Nation's unique federalist system. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Vermont, nevertheless, insists that the Clause is so anemic that federal courts have no power to look beyond a seemingly neutral and prefatory statement of legislative design to determine whether a law's actual purpose and effect entrench upon federal power. But the argument that "the purposes set forth in the statutory text are controlling" (Vt. Br. 34) is simply wrong on the law. Worse still, if credited, it would offer every statehouse in America a simple, one-step blueprint for talking its way out of the preemptive effect of federal law and otherwise immunizing laws from constitutional scrutiny. The Supremacy Clause would be feeble constitutional protection indeed if a state or local legislature could cast it aside by the expedient employment of magic words in a non-operative statutory preamble.

That, in fact, is why both the Supreme Court and this Court have repeatedly probed both the legislative record and a law's operational effect in assessing whether the law crosses permissible Supremacy Clause bounds. Moreover, judicial scrutiny that refuses to mindlessly rubberstamp a legislature's stated purpose is the norm not only in preemption cases, but also in cases involving analogous federal restrictions on state action. When confronted with objective indicia of invalid

regulatory aim or a transparent design to evade federal law, it takes more than a preamble's wink to force federal courts to cede the Constitution's ground.

THE ATOMIC ENERGY ACT PREEMPTS VERMONT'S ACT 160 AND ACT 74, BOTH OF WHICH WERE ENACTED WITH THE OBJECTIVE EFFECT AND PURPOSE OF ENCROACHING ON THE EXCLUSIVELY FEDERAL REGULATION OF NUCLEAR POWER SAFETY

A. The District Court's Preemption Analysis Hewed To The Supreme Court's *Pacific Gas* Model

The Atomic Energy Act contemplates a system of "dual regulation" of the Nation's nuclear facilities in which "the federal government maintains *complete* control of the safety and 'nuclear' aspects of energy generation," while the States retain "their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 211, 212 (1983) (emphasis added). Under that bifurcated system, Congress occupied the "entire field of nuclear safety concerns," leaving to the States only the "limited powers expressly ceded to the states" regarding economic and other technology-neutral decisionmaking. *See id.* Thus "Congress *** intended that the federal government [alone] should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." *Id*. at 205.

The federal government has therefore completely occupied the field of nuclear safety, including as it relates to nuclear plant construction and operation,

and in such cases "the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Pacific Gas*, 461 U.S. at 212-213 (citation omitted). Accordingly, all state laws regulating the safety aspects of the construction and operation of nuclear power plants "would clearly be impermissible," no matter the motivation. *Pacific Gas*, 461 U.S. at 212. As such, to the extent that the Vermont legislature's sunsetting of Entergy's Vermont Yankee nuclear plant constitutes a safety regulation of the plant's operation, notwithstanding the federal government's authorization of its continued operation through 2032, A1841, the legislation is preempted "even if enacted out of nonsafety concerns." *Pacific Gas*, 461 U.S. at 212.

But the force of the Atomic Energy Act's preemption of the field of nuclear safety does not stop there. At least where the operative effect of a state law is consistent with a nuclear safety purpose, under *Pacific Gas* both the "law's actual effect on nuclear safety," as well as "the *motivation* behind the state law," serve to "define[] the pre-empted field." *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (emphasis added). That means that, because the federal government "has occupied the entire field of nuclear safety concerns," a law will be preempted if its purpose is to enforce the State's own judgment about nuclear safety, whether or not that judgment conflicts with federal law. *Pacific Gas*, 461 U.S. at 212 (rejecting assertion that a "state may completely prohibit new construction until its safety

concerns are satisfied by the federal government" because "[s]tate safety regulation is not preempted only when it *conflicts* with federal law," but in all cases) (emphasis added). A "state judgment that nuclear power is not safe enough to be further developed [that] conflict[s] directly with the countervailing judgment of the" federal government would be preempted. *Id.* at 213. Likewise, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field," *id.*, although a State's choice "as a matter of economics" to build a fossil fuel rather than a nuclear plant might be permissible, *see id.* at 222-223. In short, *Pacific Gas* and its progeny "require[] consideration of the purpose of the allegedly preempted statute, along with its effects." *Skull Valley Band Of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004).

Defining the field in part, but not exclusively, by legislative motivation is in fact required by the Atomic Energy Act, which in a savings clause specifically preserves state and local governments' ability to regulate only so long as such regulations are "for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k); *see English*, 496 U.S. at 84 (noting that *Pacific Gas*'s approach to defining the field to include legislative purpose has "support in the text of the 1959 amendments to the Atomic Energy Act"). Given that the ultimate preemption inquiry "rests on *congressional* intent to displace state law" (Vermont Br. 42), this Court is obligated to give full effect to Congress's explicit judgment that

determining whether a law falls within the preempted field requires judicial scrutiny of state motivation.

Accordingly, when the operative effect of a state law, such as Vermont's complete ban on the continued operation of the Vermont Yankee nuclear plant, indicates a preempted safety purpose, the risk arises that the State is impermissibly regulating nuclear safety matters, and it becomes "necessary" under the Act "to determine whether there is a nonsafety rationale" for the challenged law. *Pacific Gas*, 461 U.S. at 213.

In undertaking that inquiry, the district court faithfully followed the Supreme Court's direction in *Pacific Gas* and its progeny. The court acknowledged early in its merits analysis that the "legislative policy and purposes expressed in" the preamble to Act 160 did "not refer to preempted purposes[.]" *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 229, 228 (D. Vt. 2012).

The court properly did not stop there, though. Consistent with *Pacific Gas*, it undertook a thorough and deliberate review of the enacted text of Act 160 and the relevant provisions of Act 74, as well as both Acts' effects. The court recognized that Act 160 "on its face empowers future legislatures to apply the statute to deny continued operation for radiological safety reasons and evade review." *Entergy Nuclear*, 838 F. Supp. 2d at 228; *see* VT. STAT. ANN. title 30,

§ 254(b)(2) (2010) [Act 160, §4] (requiring studies to "provide analysis of long-term environmental, economic, and *public health* issues") (emphasis added).

The court noted as well that Act 160, which was targeted exclusively at Entergy's federally authorized and operating nuclear plant, amounted to a "legislative pocket veto" of that federal authorization. *Entergy Nuclear*, 838 F. Supp. 2d at 189. In other words, the state law's effect would be to permanently shutter the plant if the Vermont legislature failed to pass an affirmative law to keep it running, *see id.* at 218-223, even though the federal government had already concluded that the plant's operations could be "conducted without endangering the health and safety of the public" until at least 2032, A1841, A1843. Again consistent with *Pacific Gas*, the district court looked beyond the statements in the preamble and, after a thorough evaluation of legislative purpose, came to the only conclusion possible: "[T]here is overwhelming evidence in the legislative record that Act 160 was grounded in radiological safety concerns and the concomitant desire to empower the legislature to act on those concerns in deciding the question of Vermont Yankee's continued operation." *Id.* at 230. The court accordingly held that Act 160 was invalid for having a "preempted radiological safety purpose." *Id.*

The district court found similarly persuasive facial evidence of impermissible purpose with regard to the legislative-approval provision of Act 74. *See Entergy Nuclear*, 838 F. Supp. 2d at 231 (noting that Act 74 "[o]n its face ***

permits the General Assembly to fail to act on a pending petition to store spent fuel for radiological safety reasons, in a manner that evades review") (citing VT. STAT. ANN. title 10, § 6522(c) (2010)). For the reasons detailed in Entergy's brief (Br. 31-44), the Chamber agrees that the trial court's analysis was correct.

B. When Examining Statutory Purpose In The Preemption Context, Courts May Ascertain Whether A Professed Purpose Is Pretextual

Vermont does not dispute (Br. 37-38) that legislative purpose is relevant to the preemption inquiry, nor could it plausibly do so under *Pacific Gas* and *English*. Instead, Vermont argues (Br. 37) that the court's purpose inquiry is purely superficial, and limited to judicial rubberstamping of the statute's "avowed" purposes. In Vermont's view, because Act 160 "[b]y its terms *** does not regulate radiological safety" (Br. 28), there is no need for further inquiry and the rest of the record must be ignored. The Constitution's Supremacy Clause is not so easily fooled.

Vermont is, of course, correct that the text of the laws did not employ the word "safety." But Vermont's Act 160 openly identified "public health issues," VT. STAT. ANN. title 30, § 254(b)(2) (2010)—a proxy for safety equally within the federal domain under the Atomic Energy Act—as an object of the law. *See Pacific Gas*, 461 U.S. at 221 (Act's purpose is to promote development and utilization of atomic energy "'to the maximum extent consistent with *** the health and safety of the public'") (quoting 42 U.S.C. § 2013(b)); *Consolidated Edison Co. of New*

York v. Pataki, 292 F.3d 338, 352-353 (2d Cir. 2002) (Act preempts all regulation of nuclear power generation in "the field of public health and safety"). Indeed, the federal government itself had already determined specifically that the plant's operations could be "conducted without endangering the *health and safety of the public*" until at least 2032. A1841, A1843 (emphasis added). In addition, Vermont's laws, by conditioning the continued operation of Vermont Yankee on legislative approval, *do* directly (and impermissibly) "regulate the radiological safety aspects involved in the *** operation of a nuclear plant[.]" *Pacific Gas,* 461 U.S. at 212.

The Vermont legislature, moreover, was well aware that the laws in question would impermissibly intrude into the federal government's exclusive sphere. The references to safety in the laws' legislative history were "almost too numerous to count," evidencing "overwhelming[ly]" that "[nuclear] safety *** was a primary motivation" for their enactment. *Entergy Nuclear*, 838 F. Supp. 2d at 229.

Still worse, the trial court uncovered evidence that the Vermont legislature, after recognizing that it was undertaking impermissible safety regulation, engaged in a concerted effort to sanitize the text of the enacted laws and to mask their actual purpose with the clear design of skirting federal preemption. For instance, when informed that "inappropriate safety discussion" created a risk of preemption, the

Chairwoman of Vermont's Senate Finance Committee responded, "Okay, let's find another word for safety." A1680.

Such drafting gamesmanship, however, is insufficient to shield a statute from the searching constitutional inquiry required under the Supremacy Clause and other constitutional provisions that police the limits of State action. Instead, what is critical for Supremacy Clause purposes is not just the preamble's strategically omitted words, but equally that (i) the statutes on their faces directly regulate the nuclear power industry and only the nuclear power industry; (ii) the laws adopt the State's own "public health" measure, VT. STAT. ANN. title 30, § 254(b)(2) (2010); (iii) the laws have an objective effect that is indicative of health and safety regulation; and (iv) the legislative record "overwhelming[ly]" confirms that they were enacted with an impermissible safety motive, *Entergy Nuclear*, 838 F. Supp. 2d at 230. Under those circumstances, the laws are preempted, and neither the trial court nor the Supremacy Clause was bound to surrender to the mere incantation of a purportedly permissible purpose in the legislation's preamble.

Vermont's contention that States can write their own tickets out of the Supremacy Clause and that courts must pay no attention to what is behind the legislative curtain is foreclosed by *Pacific Gas*, in which the Supreme Court itself rested its preemption judgment on the very analysis of legislative purpose that Vermont here seeks to avoid. Vermont's argument also ignores the well-

established body of precedent in which courts look beyond professed statements of legislative purpose in statutory text when objective data indicate a state legislative effort to circumvent other constitutional protections.

1. **Pacific Gas** ***Requires a Scrutinizing Inquiry of Relevant Indicia of Legislative Intent***

Although Vermont acknowledges that some cases do look beyond stated purpose in considering claims of preemption, it contends that those cases are inapposite because "a state's professed purpose controls unless the act itself regulates within a field preempted by federal law." (Br. 37-38).

As an initial matter, a state statute that "regulate[s] the radiological safety aspects involved in the *** operation of a nuclear plant," "even if enacted out of nonsafety concerns," is preempted. *Pacific Gas*, 461 U.S. at 212. That Vermont's measures effectively halt the continued "operation" of a nuclear plant that the federal government has approved for safe operation until 2032—and even condition the plant's continued ability to store spent nuclear fuel on legislative approval—thus requires preemption even under Vermont's own cramped view of the law.[3]

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[3] While the moratorium at issue in *Pacific Gas* involved the certification of new plants where construction had not yet begun, 461 U.S. at 198, here the Vermont laws regulate the safety aspects of the ongoing operation of Entergy's plant, posing a direct conflict with federal law, *see id.* at 209 ("'The Commission shall retain authority and responsibility with respect to regulation of *** the

Beyond that, making purpose relevant only when the law itself openly admits that it is regulating in a preempted area would render the purpose inquiry meaningless. Under *Pacific Gas*, the whole point of looking at purpose is to *determine* whether "the act itself regulates within a field preempted by federal law." 461 U.S. at 213. That is because *Pacific Gas* defined the Act's "pre-empted field" not just by the state law's effects, but also "by reference to the motivation behind the state law." *English*, 496 U.S. at 84. For example, *Pacific Gas* noted that a nuclear construction ban motivated by "safety concerns" (rather than "economic reasons," 461 U.S. at 223), would "be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use—and would be preempted *for that reason,*" *id.* at 213 (emphasis added). And that is precisely why the Supreme Court concluded it was "necessary to determine whether there is a non-safety rationale" for a law the effect of which suggested a preempted safety purpose. *Id.*

Here, the laws' effects bear the hallmarks of preempted safety regulations, and, indeed, provide the Vermont legislature the power to shut down a nuclear plant that the federal government has deemed safe to operate. Vermont

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construction and operation of any'" nuclear plant.) (quoting 42 U.S.C. § 2021(c)). This direct conflict was not addressed below, but nonetheless provides an alternative basis for affirming the judgment. *See Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of New Jersey, Inc.,* 448 F.3d 573, 580 (2d Cir. 2006).

acknowledges (Br. 32) that the "effect of Act 160 was to create a sunset date for the [Vermont Yankee] plant of March 21, 2012," twenty years earlier than the federal government's judgment, and further admits that the legislation is "very similar" to the moratorium at issue in *Pacific Gas*. Accordingly, just as it was "necessary" for the *Pacific Gas* Court "to determine whether there [was] a non-safety rationale" for that moratorium, 461 U.S. at 213, the district court was likewise required to evaluate the Vermont legislature's rationale for these functional moratorium laws.

Moreover, in evaluating the state law's rationale, *Pacific Gas* looked at *all* indicia of legislative intent, not just the statute's "professed purpose[s]." (Br. 37) In fact, Vermont's contention that the *Pacific Gas* "[C]ourt refused to analyze legislative history" (Br. 25) is flatly wrong. The *only* statutory purpose the Court relied on to assess the challenged California law was the one set forth in the law's legislative history—specifically, a report of a California State Assembly committee, which had "proposed a package of bills including § 25524.2." 461 U.S. at 213. Nor did the Court express an aversion towards legislative history generally, given that it explicitly analyzed such history in discerning *congressional* purpose related to the Act. *See id.* at 208 n.19.

Thus, far from "refus[ing] to look beyond the text" of the state law (Vermont Br. 31), the Supreme Court did not rely on the text at all in ascertaining California's purpose. To be sure, the legislative history relied upon in *Pacific Gas*

helped the State because it demonstrated that the "waste disposal problem was 'largely economic or the result of poor planning, *not* safety related.'" *Pacific Gas*, 461 U.S. at 213 (quoting California Assembly Committee On Resources, Land Use, and Energy, *Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and its Alternatives* at 18 (1976)). But the capacity of courts to probe legislative history in determining whether state legislation is preempted or otherwise unconstitutional surely cannot turn on whether or not the legislative history helps or hurts the law's validity.[4]

Vermont is correct (Br. 37) that the *Pacific Gas* Court later rejected the petitioners' request that it consider the asserted legislative motives behind *other* laws (including one "not passed"), which supposedly "share[d] a common heritage" and were "more clearly written with safety purposes in mind." 461 U.S. at 215-216. But it is hardly surprising that the Court refused to divine the so-called "true" purpose of the law challenged based on the attenuated claim that laws not at issue should be "presumed to have been enacted for the same purposes." *Id.*

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[4] Vermont also consistently argues (Br. 25, 27, 38, 45) that the trial court was required under *Pacific Gas* to have rested on the "avowed" purpose of "the state law" or of "the Act." But *Pacific Gas* did not look at the *law's* avowed purpose; rather, it "accept[ed] *California's* avowed economic purpose." 461 U.S. at 216 (emphasis added). And that purpose came not from the text of the law itself, but from the characterizations given by California representatives located in the statute's legislative history. *Id.* at 213-214.

Instead, given the plausible and uncontroverted permissible economic purpose identified in the California law's legislative history, the Supreme Court understandably deemed it "pointless" and "unsatisfactory" to look to the legislative history of unenacted laws to impugn the legislature's clear motivation as expressed in the legislative record. *Id.* at 216.[5]

The bottom line is that *Pacific Gas* does not require that a court considering an Atomic Energy Act preemption claim slavishly accept an implausible legislative purpose, or ignore all reasonable indications of intent contrary to the one proffered. Especially because there are "both safety and economic aspects to the nuclear waste issue," 461 U.S. at 196—because, in fact, "almost all matters touching on matters of public concern have an associated economic impact on society," *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994)—courts need to be able to scrutinize legislative purpose in preemption cases by resort to objective criteria beyond the statutory text. Otherwise, the ease with which States could legislatively talk their way around the Act "would make a mockery of [its] preemption provision." *National Meat Ass'n v. Harris*, 132 S. Ct. 965, 973 (2012)

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[5] In any event, *Pacific Gas* hardly stands for the proposition that a court must take the legislature's word unquestioningly. Instead, the Court accepted the economic rationale set forth in the legislative history only after the Ninth Circuit had "adopted th[at] reading," because the Supreme Court's "general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals." 461 U.S. at 214.

(state cannot evade Federal Meat Inspection Act's preemption of state livestock handling standards through backdoor restrictions on sales); *see also Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (state cannot evade Clean Air Act's preemption of state emissions standards through restrictions on purchases instead of sales or manufacture).

2. Courts Commonly Look to Evidence of Pretext in Evaluating Whether State Legislation Complies with Federal Law

Contrary to Vermont's argument, the Supreme Court has never held that "the purposes set forth in the statutory text are controlling" on the preemption question. (Vermont Br. 34). To the contrary, "the Supremacy Clause cannot be evaded by formalism." *Haywood v. Drown*, 556 U.S. 729, 742 (2009). Thus, the district court's refusal to view Vermont's prefatory language with blinders on, and its employment of the *Pacific Gas* framework to consider *all* indicia of legislative purpose, are fully consistent with the approach of the courts of appeals and the Supreme Court in both *Pacific Gas* and other preemption cases, which equally "have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992).

For example, this Court refused to be shackled to the legislature's stated purpose in ascertaining whether the State had exceeded its authority under the Supremacy Clause in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir.

1994). In that case, the City insisted that its cigarette advertising restriction was not preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340, because it was based on the "economic costs related to smoking" rather than concerns about the deleterious health effects of tobacco use, 34 F.3d at 73. This Court, however, required more than just the legislature's say so. The Court undertook an independent assessment of "the entire declaration of legislative findings and intent," and then concluded that the City's economic motivations were at best "secondary" to its health concerns. *Id.* As a result, the restriction, properly identified by the Court's scrutiny as one "based on smoking and health *** with respect to advertising or promotion of *** cigarettes," 15 U.S.C. § 1334(b), could not stand. 34 F.3d at 73.

Similarly, in *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), a law restricted tobacco advertisements located within 1,000 feet of places where children congregated to a black and white tombstone stating "TOBACCO PRODUCTS SOLD HERE," *id.* at 107. This Court was "unpersuaded by [the City's] sophistry" that the law was aimed at promoting law enforcement rather than health. *Id.* at 108. Indeed, in refusing to "blindly accept the [City's] articulated purpose of [the] ordinance," this Court specifically noted that the "legislative history of the ordinance [was] 'replete' with

references to [the City's] twin purposes of promoting 'health' and combating the dangers of smoking." *Id.* The fact "[t]hat the City Council drafted a declaration of intent that recites a law enforcement goal while scrupulously avoiding any mention of the word 'health' simply [could not] control [this Court's] preemption analysis." 195 F.3d at 108; *see also Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 418 (D. Vt. 1998) ("It strains credulity to adopt the rationale that the City's Ordinance is unrelated to smoking and health, merely because the City has stressed its purpose of reducing illegal activity by minors.").

Finally, in *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006), the town claimed that a municipal ordinance requiring tow companies to be located within one mile of its police station fell within the "safety" exception to the Interstate Commerce Act's preemption clause. But this Court disregarded the law's "general, prefatory provision" claiming safety justifications in favor of "the extant legislative history," which indicated a xenophobic desire to exclude the plaintiff from the town's list of approved tow operators. *Id*. at 145-146.

There is no legal or logical reason why Vermont's laws should be looked at with any less care or candor. That is particularly true when, as here, the purported legislative purpose is stated in a non-operative statutory preamble provision, because "the preamble is no part of the act, and cannot enlarge or confer powers,

nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo & M.V.R. Co. v. Thomas,* 132 U.S. 174, 188-189 (1889). Thus, it has long been recognized that, when a law has a plainly unconstitutional purpose, "no statutory preamble expressing purely [permissible] legislative motives would be persuasive[.]" *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 801-802 (1973) (Burger, C.J., concurring in part and dissenting in part).

Indeed, even outside the preemption context, this Court and the Supreme Court frequently look behind the veil of pronounced purpose when there are objective indicia in the statute's operative effect and legislative record that the State is attempting to evade the strictures of federal law. For example, the Supreme Court has applied a searching inquiry into purpose under the Commerce Clause, recognizing in one case that the contention "that [an] ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations *** save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *see also Sears, Roebuck and Co. v. Brown*, 806 F.2d 399, 405-408 (2d Cir. 1986) (analyzing legislative history of state banking statute in Commerce Clause challenge for evidence of protectionist intent).

The same is true with challenges under the First Amendment, where the government's characterization of a law "is, of course, entitled to some deference *** [b]ut it is nonetheless the duty of the courts to 'distinguis[h] a sham *** purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation omitted); *see Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 206 (2d Cir. 2012) (to determine whether government's purpose is "a sham," courts may consider "text, legislative history, and implementation of the statute" to "determine the motive") (citation omitted). Thus, even facially neutral laws must be scrutinized to determine whether they are motivated by an impermissible legislative purpose. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (if a "government bent on frustrating an impending demonstration" enacted a facially neutral law mandating two-year delay in parade permits, the law's "purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional"). Indeed, in *Sorrell*, the Court held that "[a]ny doubt" about the facial invalidity of the Vermont law burdening speech was "dispelled" not only by "formal legislative findings," but also by the "record" which "confirm[ed] that the law's express purpose and practical effect" were unconstitutional. *See id.* at 2663.

What these Supremacy Clause, Commerce Clause, and First Amendment precedents all have in common is that, in each context, the validity of the state law

depended on whether the legislature was acting permissibly within the confines of federal constitutional or statutory restrictions. In some cases it will be apparent that a law is impermissible based on its plain terms, but in many other cases—particularly where, as here, legislators expressly manipulate statutory language to mask impermissible intent—the constitutional effect of the law cannot be fully understood without ascertaining whether it was enacted with the purpose of, for example, discriminating against out-of-state commerce or targeting unpopular speech.

Likewise, as the record here demonstrates, when attempting to maneuver within a federally regulated field, a state legislature may have a strong incentive to disguise its true motivation and try to ensure that its law's inconsistencies with federal regulation and congressional intent somehow survive federal scrutiny. *See, e.g.*, A1680 (Vermont Senate Finance Committee Chairwoman: "Okay, let's find another word for safety."). Immunizing such behavior in Supremacy Clause law would give Vermont and similarly inclined States a powerful tool to circumvent and frustrate federal law merely by scrubbing the enacted text of any words that might reveal an impermissible motive. *See Greater N.Y. Metro. Food Council,* 195 F.3d at 108 ("That the City Council drafted a declaration of intent that recites a law enforcement goal while scrupulously avoiding any mention of the word 'health' simply cannot control our preemption analysis.").

Without some scrutiny of legislative purpose, in fact, Vermont could "'nullify nearly all unwanted federal legislation by simply'" drafting around what it knows to be areas over which the federal government is exercising exclusive control. *Greater N.Y. Metro. Food Council,* 195 F.3d at 108 (quoting *Gade*, 505 U.S. at 106). Worse yet, all states will have the ability to do exactly the same thing. *Cf. Engine Mfrs. Ass'n*, 541 U.S. at 255 ("[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme.").

3. The Purpose Inquiry Is an Objective Inquiry Based on the Text, Legislative History, and Other Indicia of Legislative Intent

The ability of courts to give meaning to statutory and constitutional inquiries into purpose does not mean, of course, that courts are to engage in some freewheeling mode of "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 861-863 (2005). Courts, instead, must undertake in the Supremacy Clause context the same type of objective and calibrated inquiry into purpose that is already "a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, *** [and is] a key element of a good deal of constitutional doctrine." *Id.* at 861. In undertaking that task, courts commonly look not to just one aspect of

the law, but instead holistically assess its "text, structure, purpose, and history." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).[6]

That same analytical model should govern in the preemption context as well. Although the purpose of any law must be gleaned, first and foremost, from its text, neither this Court nor the Supreme Court has ever said that the judicial determination of purpose must end with what is printed in the official code. Rather, in this context courts should look to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] *** the historical context of the statute," including "the specific sequence of events leading to [its] passage." *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987). As the Supreme Court recounted in *McCreary County*, 545 U.S. at 861-863, in some cases, the purpose is manifest from the law itself, *see, e.g.*, *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Stone v. Graham*, 449 U.S. 39, 41 (1980), while in other cases, the court must look to additional indicia of purpose, *see, e.g.*, *Edwards*, 482 U.S. at 595 (district court's finding of improper purpose appropriately relied on "plain language" of act, "the legislative

[6] Indeed, as noted, *congressional* purpose is one of the two principles that already "guide[s] all pre-emption analysis." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2586 (2011) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.") (citation omitted). There is no reason why a state legislature's purpose cannot be determined with similar reliability.

history and historical context," "the specific sequence of events leading to [its] passage, a report in the record, "and the correspondence between the Act's legislative sponsor and its key witnesses"); *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985) (looking to "unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor" of the challenged bill, which was "confirmed by a consideration of the relationship between this statute and the two other [enacted] measures that were considered in this case"). In either situation, however, "the government's action was held unconstitutional only because *openly available data supported a commonsense conclusion*" that the legislative purpose was impermissible. *McCreary County*, 545 U.S. at 863 (emphasis added).

In sum, the court's task in the preemption context should be to look for pretext only using the "traditional external signs" of legislative purpose gleaned from the legislative text, history, implementation, and other official acts. *See McCreary County*, 545 U.S. at 862. Such traditional and commonplace analysis, by which "an understanding of official objective emerges from readily discoverable fact," is the only practicable means of preventing States from navigating themselves out of federal constitutional constraints. *Id*.

C. The District Court Was Correct In Probing Legislative Intent

The district court properly conducted its inquiry into legislative purpose and reached the only conclusion possible—Vermont's laws tread on the federal government's exclusive control of nuclear safety.

First, the effect of Vermont's legislation—targeting and completely shutting down a single operating nuclear facility that the federal government had deemed safe to operate through 2032—was, like the "very similar" (Vermont Br. 32) moratorium in *Pacific Gas,* an indicator that an impermissible safety purpose may be afoot.

Second, key indications that the legislature acted with an impermissible purpose were apparent from the text of the laws themselves. *See Entergy Nuclear*, 838 F. Supp. 2d at 228 (recognizing that Act 160 "on its face empowers future legislatures to apply the statute to deny continued operation for radiological safety reasons and evade review" and recites motivation related to "public health") (citing VT. STAT. ANN. title 30, § 254(b)(2) (2010)); *id.* at 231 (noting that Act 74 "[o]n its face *** permits the General Assembly to fail to act on a pending petition to store spent fuel for radiological safety reasons, in a manner that evades review") (citing VT. STAT. ANN. title 10, § 6522(c) (2010)); *see also* Entergy Br. 31-44. Faced with such direct evidence that the state laws were "grounded in safety concerns" and thus might "fall[] squarely within the prohibited field," *Pacific Gas*, 461 U.S. at

213, it was incumbent upon the district court to look beyond the legislature's professed purposes.

Third, Vermont's professed economic rationale for the challenged laws is implausible. *See* Entergy Br 53-57. As the district court found, the economic purposes set forth in the preamble—such as Vermont's "'need for power,'" "'choice among power sources,'" and "need to 'craft an energy policy'"—were "invalid" with respect to a "merchant generator" that sells power on the interstate wholesale market to retail utilities, and from which the State had no obligation to purchase power. *Entergy Nuclear*, 838 F. Supp. at 230 (citation omitted). Indeed, the evidence introduced at trial demonstrated that even the discussions between the legislature and Entergy over the price of electricity sold in Vermont "was itself rooted in safety concerns, because the General Assembly wanted financial compensation for the perceived safety risk of having Vermont Yankee within the state." *Id.*

Fourth, given the effect of the law, the facial indications of preempted purpose, and the legislature's failure to offer a plausible purpose, the district court did not have to ignore the mountains of evidence demonstrating an improper purpose. *See, e.g., Skull Valley*, 376 F.3d at 1247-1248 (fact that provisions facially "address[ed] law enforcement, fire protection, waste and garbage collection and other similar matters that have been traditionally regulated by local

governments *** does not trump the preemption analysis that the controlling Supreme Court decisions require us to undertake").

Far from relying on a "small sliver of statements in the legislative record" (Vermont Br. 44), the district court carefully studied the full legislative record before concluding, based on a thoroughgoing analysis, that the legislature was motivated by nuclear safety concerns. *Entergy Nuclear*, 838 F. Supp. 2d at 227-234. That conclusion was sufficient to warrant a finding of preemption. *See Pacific Gas,* 461 U.S. at 213 (any ban on nuclear power "grounded in safety concerns" is "in the teeth of the Atomic Energy Act's objective[s] *** and would be preempted for that reason"); *see also Vango Media*, 34 F.3d at 73 (noting that laws motivated even in part by a preempted purpose cannot be saved from invalidation simply because they were also motivated by a legislative purpose that would be permissible).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,641 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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